No. 427

In the Supreme Court of the United States

OCTOBER TERM, 1948

FREDERICK W. WADE, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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military situation it was inadvisable to proceed with the trial before the court-martial which he had appointed and, accordingly, he withdrew the charges and transferred them to another command.[7] As the Court of Appeals observed (R. 102), this second step was analogous to the "determination of the judge of a civil court that in view of a sudden and uncontrollable emergency arising during the progress of the trial of a criminal case the jury should be discharged and the defendant subsequently tried before another jury." It is essential to keep in mind the distinction between the court-martial's call for the production of additional witnesses, which occasioned the continuance of the trial, and the war-time exigencies which thereafter made it impracticable to proceed with the trial before that court.[8]

The historical setting in which the military commander acted in withdrawing the charges fully supports the conclusion reached by the Court of

[7] In contending that the Commanding General, as "a representative of the prosecution," is "without power or discretion to terminate a case after jeopardy has attached without hazarding the constitutional defense of double jeopardy" (Pet. 16-17), petitioner confuses the existence of his authority with the consequences of its exercise. The officer empowered to convene a court-martial has full power to withdraw any charges from consideration by such court, to enter a *nolle prosequi* as to any charges, and to dissolve the court itself. *Manual for Courts-Martial*, corrected to April 20, 1943, pars. 5a, 5b, 5c and 72; 1 Winthrop, *Military Law and Precedents* (2d ed., 1896), 224-225, 370-371. Whether or not this authority is exercised under such circumstances as to create a bar to a second trial depends, as we show in the text, upon whether or not the termination of the trial was due to necessity.

[8] See 48 Col. L. Rev. 299.

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OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 97-106) are reported at 169 F. 2d 973. The opinion of the District Court ordering petitioner discharged from custody (R. 12-26) is reported at 72 F. Supp. 755. The oral opinion of the District Court on respondent's motion for reconsideration (R. 92-95) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered September 7, 1948 (R. 107), and a petition

for rehearing (R. 111-127) was denied October 8, 1948 (R. 128). The petition for a writ of certiorari was filed November 18, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also 28 U. S. C. 2101(e).

QUESTIONS PRESENTED

1. Where a trial by court-martial in wartime in a combat area was adjourned by the court for the purpose of hearing further testimony and during the adjournment the charges were withdrawn by the appointing military commander on account of a change in the tactical situation which made the distance to the residence of the additional witnesses so great that the trial could not be completed within a reasonable time, was the accused placed in such jeopardy that he could not thereafter be tried for the same offense?

2. Whether the Court of Appeals, in the habeas corpus proceeding where the evidence showing the reason for the military commander's withdrawal of the charges from the court-martial consisted entirely of writings, was warranted in finding the commander's reason for such withdrawal to be different from that found by the District Court.

3. Whether the action of the court-martial in overruling the plea of double jeopardy and exercising jurisdiction in the case may be supported by matters dehors the court-martial record in a habeas

corpus proceeding which collaterally attacks the jurisdiction of the court-martial on the double jeopardy issue.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

Petitioner, while serving in the 76th Infantry Division of the Army, on duty in the European Theater of Operations, was charged under the 92d Article of War (10 U. S. C. 1564) with the rape of a German woman. A general court-martial, which was appointed by the Commanding General, 76th Infantry Division, convened on March 27, 1945, at Pfalzfeld, Germany, about 22 miles from Krov,

where the alleged offense had been committed.[1] The prosecution and defense each presented evidence and rested, and, after closing arguments by both sides, the case was submitted and the court-martial closed. Some time later, still on the same day, the court-martial opened, announced its desire to hear the testimony of three designated persons, and further announced that the court would be continued until a later date to be fixed by the trial judge advocate. (R. 16, 60, 69.)

Seven days later, on April 3, 1945, the charges were withdrawn from the court-martial by the Commanding General, 76th Infantry Division, who directed that no further proceedings be taken by the court (R. 69; Pet. 4). On the same day he transmitted the charges to the Commanding General, Third United States Army, with the following communication (R. 16):

> 1. The charges and allied papers in the case of Pfc. Frederick W. Wade, 39208980, Co. K, 385th Inf., are transmitted herewith with a recommendation of trial by general court-martial. The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of the alleged rape, were unable to be present due to sickness, and the

[1] Another soldier who was separately charged with the rape of another German woman on the same occasion was tried together with petitioner with their consent (R. 67) and was ultimately acquitted (R. 45). His presence in the case is immaterial to the issues here presented.

Court continued the case so that their testimony could be obtained. Due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time.

2. The accused has been served with a copy of the charges. The third copy of the supporting papers is in the hands of the defense counsel and the same will be forwarded as soon as they are obtained from him.

3. The Trial Judge Advocate obtained the name of Mrs. Anni Endt, a neighbor of the alleged victim, and it is believed that she can further identify the accused.

On April 18, 1945, without taking further action, the Commanding General, Third United States Army, transmitted the charges to the Commanding General, Fifteenth United States Army, with the following communication (R. 16-17):

1. Transmitted herewith are charges and allied papers in the case of Private First Class Frederick W. Wade, 39208980, Company K, 385th Infantry, charged with rape of a German woman under Article of War 92. The German civilian against whom the crime was committed and other necessary civilian witnesses are residents of territory now under your jurisdiction.

2. It is impracticable to try this case by court-martial appointed at this headquarters

at this time in view of the tactical situation and fact that the location of the incident and places of residence of necessary civilian witnesses are a considerable distance without the boundaries of this command. Standing Operating Procedure No. 35, Military Justice—Continental Operations, published 16 July, 1944, by Headquarters European Theater of Operations, U. S. Army, provides that when practicable the trial of cases involving the peace and quiet of a civil community will be held in the immediate vicinity of the alleged offenses. In order to accelerate the prompt trial of these offenses, it is requested that you assume court-martial jurisdiction in these cases.

3. The accused is at present in confinement in the Third U. S. Army Stockade, but will be delivered upon request to such place as you may designate.

Thereafter, on April 26, 1945, the charges against petitioner were referred for trial to a general court-martial which was convened by the Commanding General, Fifteenth United States Army, on June 30 and July 1, 1945, at Bad Neuenahr, Germany (R. 8), about 40 miles from Krov. Petitioner pleaded double jeopardy in bar (R. 13-14, 46, 68-69) but the plea was overruled by the court (R. 46, 69) and, after trial, he was found guilty (R. 8, 46) and sentenced to dishonorable discharge, total forfeitures, and life imprisonment (R. 9).

The Staff Judge Advocate, Fifteenth Army, upon review[2] (R. 45-66), held the record of the trial legally sufficient but recommended that the sentence be reduced in view of petitioner's combat record, and the Commanding General, Fifteenth Army, thereupon approved the sentence but reduced the period of confinement to twenty years (R. 9). In compliance with the requirements of AW 50½ (10 U. S. C. 1522), the record of trial was then reviewed (R. 66-78) by Board of Review No. 4 in the Branch Office of the Judge Advocate General, European Theater, and that Board found substantial competent evidence to support the finding of guilt (R. 68). The Board was of the opinion, however, that the plea of double jeopardy should have been sustained (R. 69-78). The Assistant Judge Advocate General in charge of the Branch Office, upon review pursuant to AW 50½, disagreed on the ground that, since the Commanding General of the 76th Infantry Division, in the exercise of his discretion, had determined that the tactical situation made the obtainment of the designated witnesses impracticable and precluded prompt disposition of the case, the doctrine of "imperious necessity" justified him in withdrawing the charges from the first court-martial in the interests of the military necessities of his command (R. 78-87). After consideration of these divergent

[2] Pursuant to AW 46 (10 U.S.C. 1517) and par. 87b, *Manual for Courts-Martial.*

views, the Commanding General, European Theater, acting in accordance with AW 50½, confirmed the sentence on December 21, 1945 (R. 10).

Petitioner, who was confined under the sentence in the United States Penitentiary at Leavenworth, Kansas, petitioned the District Court for the District of Kansas for a writ of habeas corpus (R. 2-8), asserting, in substance, that the sentence was illegal because he had been twice placed in jeopardy for the same offense, in violation of the Fifth Amendment and of Article of War 40 (10 U. S. C. 1511). After a hearing, the district court held that petitioner was illegally detained and ordered him released on bond, saying, *inter alia* (R. 25)—

> * * * if the record in the case at bar indicated that the "tactical situation" was the motivating reason for discharging the first court-martial, this Court would not hesitate to hold that the doctrine [of "imperious" or "urgent" necessity] is applicable. As previously pointed out, however, the absence of witnesses, rather than an emergency due to the military situation, seems to have been the reason for the withdrawal of the case from the court-martial which first heard it.

The court's judgment was dated May 9, 1947 (R. 26). Thereafter, on June 12, 1947 (R. 26-30), a motion for reconsideration was filed, addressed to the paragraph just quoted, in which the Government offered to show "that it was the tactical situations arising out of the concluding six weeks of

hostilities in the European Theafer of Operations against the armies of the German Reich which were in fact responsible for the action taken here" (R. 27). The court denied the motion for reconsideration on the ground that it was essentially a motion for a new trial, not filed within ten days after final judgment, and that the court was accordingly without jurisdiction to entertain it (R. 31, 92-95).

Upon appeal to the Court of Appeals for the Tenth Circuit the judgment was reversed and the cause remanded with directions to deny the petition for a writ of habeas corpus and remand petitioner to respondent's custody (R. 107). The Court of Appeals, one judge dissenting, held that in view of the military situation prevailing at that time, of which judicial notice was taken, the Commanding General's decision to withdraw the charges and refer them to another command for trial because of the rapid advance of his troops was grounded in necessity and, therefore, the subsequent proceedings did not violate the double jeopardy provision (R. 100-102).

ARGUMENT

1. Article of War 40 (10 U. S. C. 1511) provides:

> No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if

there be one, the confirming authority shall have taken final action upon the case.

No authority shall return a record of trial to any court-martial for reconsideration of—

(a) An acquittal; or

(b) A finding of not guilty of any specification; or

(c) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of war; or

(d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

And no court-martial, in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited.[3]

It will be observed that under the language of Article of War 40, quoted above, petitioner was not subjected to a second trial, because the first court-martial proceeding was not a trial within the meaning of that article, since neither the reviewing nor the confirming authority had taken any action be-

[3] The precursors of this article in the articles of 1806 (2 Stat. 359, 369), 1874 (R. S. 1342), and 1916 (39 Stat. 619, 650, 657) provided simply that no person "shall be tried a second time for the same offense."

fore the withdrawal of the charges from that court. There is, however, no occasion to determine whether Article of War 40, apart from the double jeopardy clause of the Fifth Amendment, controls the instant case. The Board of Review (R. 70), the Assistant Judge Advocate General (R. 79), and both courts below (R. 21, 99-100) all assumed that the double jeopardy clause applies to proceedings before courts-martial, and that "jeopardy" attached when petitioner was put to trial. We submit that it is unnecessary to reach those questions in this case because the issue presented, i. e., whether petitioner was twice put in jeopardy, may be resolved under the doctrine of necessity, a doctrine long recognized in the law of double jeopardy. And for like reason, we submit that it is unnecessary to consider the problem whether a civil court may, upon collateral attack by way of habeas corpus, review the decision of a military tribunal overruling a plea of double jeopardy. Conceding, *arguendo*, therefore, that the double jeopardy clause in the Fifth Amendment applies to court-martial proceedings[4] and that a civil court may review a court-martial decision overruling a plea on the attachment of former jeopardy,[5] we do not find any merit in petitioner's contention (Pet.

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[4] In *Carter* v. *McClaughry*, 183 U. S. 365, 387-390, the question whether the Fifth Amendment applies was expressly reserved. But cf. *Grafton* v. *United States*, 206 U. S. 333, 352.

[5] But see *Carter* v. *McClaughry*, 183 U. S. 365, 388-390; *Sanford* v. *Robbins*, 115 F. 2d 435, 439 (C.C.A. 5), certiorari denied, 312 U. S. 697.

14-15) that the court below was wrong in holding that he was not subjected to double jeopardy.

The doctrine of double jeopardy contemplates that even civil courts of justice have "the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated" (*United States* v. *Perez*, 9 Wheat. 579, 580); and that, when a jury has been so discharged, the defendant has not been in such jeopardy as would constitutionally bar a new trial. *Pratt* v. *United States*, 102 F. 2d 275, 280 (App. D. C.). The cases relied upon by petitioner as in conflict with the decision below (Pet. 14) explicitly recognize that the double jeopardy doctrine is qualified by the corollary principle that the stopping of a trial for necessary reasons arising during its course does not preclude a subsequent trial before another jury.

"Necessity" may be manifest in a variety of instances. Thus, it is not double jeopardy if the first jury is discharged because of failure to agree (*United States* v. *Perez, supra; Logan* v. *United States*, 144 U. S. 263. See *Dreyer* v. *Illinois*, 187 U. S. 71; *Keerl* v. *Montana*, 213 U. S. 135); because it appears in the course of the trial that a juror is acquainted with a defendant (*Simmons* v. *United States*, 142 U. S. 148); because one of the petit jurors was a member of the grand jury that

returned the indictment (*Thompson* v. *United States*, 155 U. S. 271); or because the trial judge becomes ill (*Freeman* v. *United States*, 237 Fed. 815 (C. C. A. 2)). On the other hand, where a case is taken from a jury for reasons of convenience rather than necessity, the defendant is held to have been in jeopardy and may not be retried. Thus, a defendant cannot be retried where the prosecutor enters a *nolle prosequi* because his evidence appears insufficient (*Clawans* v. *Rives*, 104 F. 2d 240 (App. D. C.)); or when he proceeds without having all of his witnesses present (*Cornero* v. *United States*, 48 F. 2d 69 (C. C. A. 9)); or where the trial judge withdraws counts of an indictment from the jury's consideration purely as a matter of convenience (*United States* v. *Kraut*, 2 F. Supp. 16 (S. D. N. Y.)).

In the instant case, the court-martial directed the production of additional witnesses and adjourned until they could be produced.[6] Thereafter, during the adjournment, the military commander determined that in view of the developments in the

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[6] See Manual for Courts-Martial, par. 75a:

"The court is not obliged to content itself with the evidence adduced by the parties. Where such evidence appears to be insufficient for a proper determination of any issue or matter before it, the court may and ordinarily should, take appropriate action with a view to obtaining such available additional evidence as is necessary or advisable for such determination. The court may, for instance, require the trial judge advocate to recall a witness, to summon new witnesses, or to make investigation or inquiry along certain lines with a view to discovering and producing additional evidence."

Appeals. Beginning on the day after the court-martial's adjournment on March 27, 1945, the 76th Division commenced an advance into Germany and in consequence moved its headquarters 14 times in less than a month, over a distance of some 275 miles (see graphic sketch, App. *infra*, reproduced from map facing R. 30).

When the charges were withdrawn from the court-martial on April 3, 1945, the 76th Division's headquarters was already over 70 miles from Pfalzfeld, the original place of trial, and about 100 miles from Krov, where the witnesses resided.[2] The Commanding General of the 76th Division, upon whom was imposed the duty of supervising the proper functioning of the general courts-martial under his jurisdiction, was called upon to determine not only how the witnesses whose testimony the court had required would be produced, but also whether it was advisable to bring them to the place of trial. The solution of this problem involved many factors of which he was the best judge, among which were the expediency and desirability of transporting German witnesses from their homes to the place of trial when they had to be moved a considerable distance in time of combat; the methods and means of feeding and billeting

[2] Between the time the Third Army received the papers in the case and the time it sent them to the Fifteenth Army, its own front lines had advanced as much as 125 miles at some points (see graphic sketch, App., *infra*, reproduced from map facing R. 30).

them while they were absent from their homes; and the time and energies of personnel which would be consumed in the effort. His decision that the military situation required the withdrawal of the charges and their transfer to a court-martial which could be convened near the scene of the crime was based upon the military necessities of his command and, we submit, properly came within the doctrine of necessity.[10]

In this connection, it is also important to bear in mind that military courts differ from civil courts. The latter have fixed places of trial and fixed terms of court; calendars are published in advance; the prosecutor knows when his witnesses must be ready and he has process to secure their attendance. On the other hand, as the Assistant Judge Advocate General pointed out (R. 80-81):

> * * * Courts-martial are not permanent institutions in the sense of permanency of the civil courts. They are called into being at the will of the authority holding courts-martial jurisdiction. Their membership is subject to continuous change depending upon other duties of the personnel who are eligible to be appointed members of same. They conduct their business at such times and places as general conditions in the field permit or require. They have no fixed and predetermined places of sit-

[10] An additional reason for transmitting the charges to another command was an Army regulation which provided that when practicable cases involving the peace of a civil community should be tried in the immediate vicinity of the alleged offenses (R. 17, fn. 4).

> ting. There are no terms of courts-martial * * * *, and due to the exigencies of the situation under which they operate they cannot arrange trial calendars in advance with the same degree of certainty and accuracy as do the civil courts. In order to perform their duties efficiently and expeditiously, they must possess a high degree of flexibility. They conduct their trials under unusual conditions primarily dictated by the military situation and the condition of the command.

When due regard is given to these basic differences between civil and military courts, the determination of a military commander, made in good faith, that the tactical situation required the withdrawal of a case from a court-martial prior to the completion of the trial should be held as conclusive as the decision of a federal district judge that a jury is unable to agree. Certainly, the latter's determination cannot be reviewed, for, as stated in *Logan* v. *United States*, 144 U. S. 263, 298, "* * * whether the discharge of the jury was manifestly necessary in order to prevent a defeat of the ends of public justice, was a question to be finally decided by the presiding judge in the sound exercise of his discretion."

We do not mean to suggest that it would have been open to the military commander under the pretense of acting on tactical considerations to withdraw the case by way of *nolle prosequi* and then transmit the charges for a new trial by another

court-martial appointed by him. The rule of double jeopardy might well apply under those circumstances. Cf. *Clawans* v. *Rives*, 104 F. 2d 240 (App. D. C.). But where, as here, no showing has been made that the reason assigned by the military commander for his action was sham, it should be accepted as conclusive.

2. Since the evidence of the reason for the withdrawal of the charges from the first court-martial was all documentary or matters to be judicially noticed, the Court of Appeals was in the same position as the District Court to make deductions and conclusions. *A fortiori*, the appellate court could reach its own conclusions independently of those reached by the District Court on the reason for the military commander's withdrawal of the charges. Cf. *Baumgartner* v. *United States*, 322 U. S. 665, 670-671. Although the reasons for this action by the Commanding General, 76th Division, do not appear in the communication addressed to his subordinate officer, the Trial Judge Advocate, by which he withdrew the charges (Pet. 4), the memorandum on his behalf transmitting the charges to the Commanding General, Third Army, referred to "the tactical situation" as having made the distance to the residence of the desired additional witnesses so great that the trial could not be completed within a reasonable time (R. 16). By taking judicial notice of the rapid movement of the armed forces in that theater and the fluid conditions

which obtained in the field at that time, the Court of Appeals inferred—properly, we submit—that "the withdrawal of the charge from the court-martial was not predicated solely upon the absence of the witnesses at the time of the trial, through oversight or otherwise, or solely upon the absence of the witnesses at the time the charge was withdrawn. Instead, it is fairly clear that the withdrawal was based upon the tactical situation intervening and developing after the trial which made it infeasible to produce such persons before the court-martial at its then location" (R. 101).

3. Petitioner also contends (Pet. 15) that since the court-martial which overruled the plea of double jeopardy did not base its decision upon the doctrine of imperious necessity, reliance upon that ground by the Court of Appeals constitutes a denial of due process of law.

The record does not disclose the reasons for the court-martial's decision in overruling the plea in bar. The highest military authority of review considered the issue whether the withdrawal of the charges from the first court-martial was due to necessity and approved the sentence only after considering the whole record, including the opinion of the Assistant Judge Advocate General that the requirement of "imperious necessity" was satisfied (R. 82, 9-10). The basic fallacy of petitioner's position is his supposition that the validity of the court-

martial's assumption of jurisdiction must rest, in habeas corpus proceedings, on matters shown to have been introduced before the court martial. We think the law is otherwise. Just as a petitioner in habeas corpus is free to go outside the record to establish lack of jurisdiction in the tribunal which tried him (e.g., *Johnson* v. *Zerbst*, 304 U. S. 458; *Von Moltke* v. *Gillies*, 332 U. S. 708) so the respondent similarly may support that jurisdiction by matters dehors the record (*Givens* v. *Zerbst*, 255 U. S. 11; *Bowen* v. *Johnston*, 306 U. S. 19).[11]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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[11] *Cole* v. *Arkansas*, 333 U. S. 196, cited by petitioner (Pet. 15, 17), is not to the contrary. In that case the petitioners were convicted under one section of a statute and the convictions were affirmed under another section, violations of which had not been charged. The situation here is clearly distinguishable. The affirmance by the military agencies of review was for the very offense of which petitioner had been charged and convicted (R. 8-10).

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fundamental requirements of due process of law, enforceable by the courts. Cf. *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664, 665-666 (C.A. 3). Such theoretical possibilities of misuse, curable when they arise, should not render the statute void.

The constitutional conception of double jeopardy has an irreducible core—prohibition of successive punishments for the same offense—and an undefined penumbra shading off to meet the sometimes competing forces of the efficient administration of criminal justice and the punishment of the guilty. Cf. *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 462-463, 469. It is in this outer area that the special military rule incorporated in AW 40 has its function, and it is this area which the complex of differing state jeopardy principles proves to be unmarked by defined boundaries. The multitude of variants in the treatment of double jeopardy in state constitutions, statutes, and decisions show,[16] we think, that there exists a periphery in which discretion and selection is allowable, and that the choice Congress made, with respect to military proceedings, falls within that area. Some states, for instance, seem in accord with AW 40 in permitting the defense of former jeopardy only where a previous conviction or acquittal exists. *E. g.*, *Hoffman* v. *State*, 20 Md. 425, 433; *Anderson* v. *State*,

[16] These have been collected in the American Law Institute's Proposed Final Draft of the chapter on Double Jeopardy of the Institute's Code of Administration of the Criminal Law (March 1935), pp. 61-92. Another extensive collection of cases is contained in Note (1940) 24 Minn. L. Rev. 522.

86 Md. 479; 482 (jeopardy does not attach until verdict); *Lovern* v. *State*, 140 Miss. 635 (previous case dismissed at request of county attorney for insufficiency of evidence); *Smith and Bennett* v. *State*, 41 N. J. Law 598; *State* v. *Van Ness*, 82 N. J. Law 181, 183 (previous jury improperly discharged by clerk before verdict). Other states prescribe still other variations, *e. g.*, *Palko v. Connecticut*, 302 U.S. 319 (new trial at instance of state). The rules are many, the shadings both large and fine. Functioning in a sector of the law such as this, the traditional military rule cannot be stigmatized as invalid, even though it differ from the comparable civil principle controlling in the federal courts.

b. The historical roots and support for the military rule go deep, as we have pointed out (*supra*, pp. 25-32). The rule also gains its strength from the nature of courts-martial and their fundamental differences from civilian tribunals, which bear upon the appropriate double jeopardy principle to govern their proceedings. These differences, and the resulting problems of military justice, have been ably sketched by the Assistant Judge Advocate General in his review in this case (R. 80-82). The personnel of courts-martial differ from those of the civil courts in training, major occupation, availability, and competing demands upon their services. Courts-martial are temporary and mobile, in contrast to the permanent duration and static location of civil tribunals. Combat or field conditions are likely to give rise to unexpected,

burdensome, or uncontrollable emergencies. The problems of securing witnesses and of having them available are hardly the same, especially on foreign soil and in a zone of combat operations. The problems of guarding and maintaining prisoners are greater. "In order to perform their duties efficiently and expeditiously, they [courts-martial] must possess a high degree of flexibility." They conduct their trials under unusual conditions primarily dictated by the military situation and the condition of the command" [17] (R. 81). These factors all warn against an automatic transfer of civil law rules of criminal justice and automatic rejection of the variant which has developed in the military law.

The co-existence of partially separate rules of double jeopardy for civil and military proceedings is neither unique nor strange in the application of the protections of the Bill of Rights. The meaning of Due Process of Law plainly differs in many respects for those in the military service (cf. *Reaves v. Ainsworth*, 219 U.S. 296, 304). The soldier's rights of free speech and assembly are doubtless less broad (cf. *Board of Education v. Barnette*, 319 U.S. 624, 642). Though he is entitled to defense counsel, he has no absolute all-embracing constitutional right to have a lawyer as counsel. And it is not unlikely that certain punishments inflicted on him (*e. g.*, restriction to limits of specified areas; loss of privileges) would be held violative of the

[17] See *infra* pp. 45-48, for a discussion of the specific problems which arose in the instant case.

Eighth Amendment if imposed by civil courts on civilians. The Amendments' protections are applied, not mechanically, but in the light of the differing status, circumstances, and conditions.

d. The power of Congress to declare an allowable double jeopardy rule has already been judicially upheld by a Court of Appeals, in a situation raising a related problem. In *Sanford v. Robbins*, 115 F. 2d 435 (C.A. 5), certiorari denied, 312 U.S. 697, the accused had been tried for rape and sentenced to death under the 1916 Articles of War (39 Stat. 650-670), which made no provision for rehearings, *i. e.*, new trials. But the Acting Judge Advocate General held that the errors committed had been so fundamental that they reached the very jurisdiction of the court-martial, and the President, on the strength of that holding, ordered a new trial. At the new trial, accused's plea of double jeopardy was overruled by the court-martial, he was found guilty and sentenced to life imprisonment, and this second sentence was approved by the President in 1920. Nineteen years later, the accused sued out a writ of habeas corpus. The Court of Appeals held, reversing the district court, that the second court-martial's action in overruling the plea of double jeopardy was not reviewable on habeas corpus (115 F. 2d at 437; see *supra*, p. 21), but that, in any event, the court-martial's ruling was correct. Considering the 1920 form of AW 40, together with the appellate procedure of AW 50½, as confirming the President's earlier order for a new trial, the court said that by its 1920 Act Congress had

construed the Constitution to permit an unconsented second hearing of a case on stated conditions, and that it was not inclined to hold the statute unconstitutional, even though, it implied, the civil practice was different. 115 F. 2d at 439.

3. *Application of the military rule to petitioner's case:* Under this military rule of double jeopardy, as we read it, petitioner obviously has no case, and the district court so recognized (R. 20). He was neither convicted nor acquitted at his first trial, nor did that court-martial make any finding as to his guilt or innocence. We show below that the Commanding General, 76th Infantry Division, was authorized to withdraw the charges as he did (*infra*, pp. 48-52), but even if he acted improperly, no more than a mistrial resulted, and the first proceeding—not ending in conviction or acquittal—could not raise a bar to retrial. Cf. *Manual for Courts-Martial, 1928,* pars. 5a, 72 (quoted *supra* p. 32); *State* v. *Van Ness,* 82 N. J. Law 181 (clerk's improper discharge of jury before verdict did not create defense to second trial).[18]

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[18] There is no Article for the Government of the Navy dealing with double jeopardy, comparable to AW 40, but Section 408 of *Naval Courts and Boards* provides a rule which differs from the military rule in two particulars. The present Section 408 provides:

> The fifth amendment to the Constitution of the United States provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." A person is twice put in jeopardy if he is twice put on trial for the same offense. In order, however, to sustain a plea of former jeopardy, the accused must show that:

C. Even if the general civilian principles of double jeopardy apply, petitioner's defense is not sustainable.

1. The rule in the civil courts is that, where a trial is stopped on the ground of necessity, the defendant can thereafter be retried consistently with the double jeopardy clause of the Fifth Amendment.

The doctrine of double jeopardy, as applied in the criminal courts of the United States, contem-

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(1) Upon a former trial, he had been actually acquitted or convicted; or

(2) Upon a former trial, after he had been arraigned and the prosecution had rested its case, the convening authority entered a nolle prosequi (or withdrawal or discontinuance), over the objection of the accused, in order to prevent the court-martial from arriving at a finding.

In either case set out above, the jeopardy is complete and it matters not whether any action, or, if any, what action has been taken upon the proceedings by the reviewing authority. But the proceedings upon a "fatally defective" specification do not constitute former jeopardy.

This provision does not incorporate the appellate procedure in the concept of "trial" as does AW 40, and, in Subparagraph (2), establishes a specified type of *nolle prosequi* as a bar. (This latter exception was added in 1947.)

In the present case, the Navy provision would reach the same result as the Army rule, since there has been no prior conviction or acquittal, and no claim (or showing) that the charges were withdrawn to prevent the first court-martial from arriving at a finding. See *supra* pp. 32, fn. 15, *infra* pp. 55, 56-57, fns. 24-25.

The British rule on retrial after a discontinued or interrupted trial appears to be the same as the military rule; as we have set it forth. See *Manual of Military Law*, 1929 (1939 reprint), pp. 564, 662, 480.

plates that these courts have "the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere" (*United States* v. *Perez*, 9 Wheat. 579, 580), and when a jury has been thus discharged, the defendant may again be tried for the same offense.

The principle has been applied in a variety of circumstances. Thus, it is not double jeopardy if the first jury is discharged because unable to agree (*United States* v. *Perez*, *supra*; *Logan* v. *United States*, 144 U.S. 263; see *Dreyer* v. *Illinois*, 187 U.S. 71; *Keerl* v. *Montana*, 213 U.S. 135), or because it appears, in the course of the trial, that a juror is acquainted with the defendant (*Simmons* v. *United States*, 142 U.S. 148; *United States* v. *McCann*, 36 F. 2d 52 (S.D. N.Y.)); or because one of the petit jurors was a member of the grand jury which returned the indictment (*Thompson* v. *United States*, 155 U.S. 271); or where the appearance of prejudicial articles in the public press was thought to make a fair trial impossible (*United States* v. *Montgomery*, 42 F. 2d 254 (S.D. N.Y.)); or where the trial judge was of the opinion that his own remarks had been prejudicial (*United States* v. *Giles*, 19 F. Supp. 1009 (W. D. Okla.)); or where a juror appeared to be insane after the

commencement of the trial (*United States* v. *Haskell*, 4 Wash. C. C. 402, Fed. Case No. 15321, 26 Fed. Cas. 207 (C. C. E. D. Pa.)); or where the first jury was discharged because the defendant was not rearraigned after the overruling of his demurrer to the indictment (*Loiato* v. *New Mexico*, 242 U. S. 199; *United States* v. *Riley*, 5 Blatchf. C. C. 204 (C. C. S. D. N. Y.) Fed. Case No. 16164); or where the proceedings were discontinued because of the illness of the trial judge (*Freeman* v. *United States*, 237 Fed. 815 (C. A. 2)), or the incapacity of a juror (*United States* v. *Potash*, 118 F. 2d 54 (C. A. 2), certiorari denied, 313 U. S. 584; *United States* v. *Bigelow*, 14 D. C. Rep. 393, 401 (Sup. Ct. D. C.), habeas corpus denied, 113 U. S. 328). As Mr. Justice McLean long ago said on circuit (*United States* v. *Shoemaker*, 2 McLean 114, 119, Fed. Case No. 16279, 27 Fed. Cas. at 1068-1069 (C. C. D. Ill.)):

"* * * The discharge of a jury in a criminal case, on the ground of a necessity which could neither be foreseen nor controlled, imposes no hardship on the defendant of which he has a right to complain. He, alike with the government, must submit to the law of necessity, which, of all other laws, is the most inexorable."

On the other hand, if a case is taken from the jury for reasons of convenience rather than necessity, the defendant is held to have been in jeopardy, and may not be retried. Where the prosecutor enters a *nolle prosequi* because his evidence appears insufficient, a later trial is barred (*Clawans* v. *Rives*, 70 App. D. C. 107, 104 F. 2d 240; *United*

States v. *Shoemaker, supra*), and the same is true when he proceeds without having all his witnesses present (*Cornero* v. *United States,* 48 F. 2d 69 (C. A. 9)), or where the trial judge withdraws counts of an indictment from the jury's consideration purely as a matter of convenience (*United States* v. *Kraut,* 2 F. Supp. 16 (S. D. N. Y.)).

There have been differing theoretical formulations of the place of the necessity principle, varying with the view as to when "jeopardy attaches." It is frequently said that jeopardy attaches once evidence is heard (*Clawans* v. *Rives, supra,* at 242; *McCarthy* v. *Zerbst,* 85 F. 2d 640, 642 (C. A. 10)), and for those courts a later discontinuance of the trial because of necessity seems to constitute a recognized exception to the prohibition against double jeopardy. See Note (1940) 24 Minn. L. Rev. 522. On the other hand, there are expressions to the effect that there can be no jeopardy until verdict (*United States* v. *Watkins,* 3 Cranch C. C. 441, 570, Fed. Case No. 16649, 28 Fed. Cas. at 479 (C. C. D. C.); *United States* v. *Haskell,* 4 Wash. C. C. 402, 410-411, Fed. Case No. 15321, 26 Fed. Cas. at 212), or if the trial fails other than on the merits (*Amrine* v. *Tines,* 131 F. 2d 827, 834 (C. A. 10)). For those who take this view, prior discontinuance of a trial for necessity cannot, of course, involve the defendant in jeopardy.

But whatever the proper formulation of the jeopardy doctrine, there is no disagreement as to the existence or significance of the necessity principle (or exception). The cases recognize its capac-

ity to meet emerging developments, and reflect a reluctance to delimit the situations in which it can properly be applied. This Court, in *United States* v. *Perez, supra*, noted that "it is impossible to define all the circumstances, which would render it proper to interfere." More recently, the Chief Justice declared, while a member of the Court of Appeals (*Pratt* v. *United States*, 70 App. D. C. 7, 12, 102 F. 2d 275, 280): "There is no better settled rule than that courts of justice may discharge a jury and order subsequent trial with no right in the defendant to contend that his constitutional rights have been invaded. This action has been taken in the past for many reasons that have manifested themselves, and will be taken in the future for many other proper reasons which will manifest themselves, in the administration of justice." And the Fifth Circuit speaks, in general terms, of the prevention of a verdict "by something serious," in contrast to the stopping of a trial "for insufficient cause." *Sanford* v. *Robbins*, 115 F. 2d 435, 438-439 (C. A. 5), certiorari denied, 312 U. S. 697.[19]

2. Petitioner's first trial was discontinued because of necessity.

The sequence of events in the present case has its counterpart in criminal trials in the civil courts. Two steps were taken. First, the court-martial

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[19] "The truth is, that the cases recorded are but examples to illustrate the application of the rule, not rules themselves by which future judges are to be limited and restrained." *Commonwealth* v. *Purchase*, 2 Pick. 521, 525 (Mass. 1824).

directed the production of additional witnesses, as it was entitled and encouraged to do under par. 75a of the *Manual for Courts-Martial, 1928,*[20] and adjourned until they could be produced (R. 16). This step did not differ substantially from the admitted power of a Federal trial judge to call as the court's witnesses persons whom neither party feels free to call as its own witnesses (*Litsinger* v. *United States*, 44 F. 2d 45 (C.A. 7); *Young* v. *United States*, 107 F. 2d 490 (C.A. 5); *Chalmette Petroleum Corp.* v. *Chalmette Oil Distributing Co.*, 143 F. 2d 826, 829 (C.A. 5); 3 Wigmore, *Evidence* (3d ed. 1940) sec. 918; cf. Rule 28, F.R.Crim.P.) Secondly, during the adjournment, the military commander who had convened the court-martial determined that in view of the progressive advance of his forces and the developments in the military situation, the trial should not be continued before the court-martial he had appointed. Accordingly, he withdrew the charges and transferred them to another command better situated for the trial of the accused. As the Court of Appeals observed (R. 102), this second step was analogous to the "determination of the judge of a civil court that

[20] "The court is not obliged to content itself with the evidence adduced by the parties. Where such evidence appears to be insufficient for a proper determination of any issue or matter before it, the court may and ordinarily should, take appropriate action with a view to obtaining such available additional evidence as is necessary or advisable for such determination. The court may, for instance, require the trial judge advocate to recall a witness, to summon new witnesses, or to make investigation or inquiry along certain lines with a view to discovering and producing additional evidence."

in view of a sudden and uncontrollable emergency arising during the progress of the trial of a criminal case the jury should be discharged and the defendant subsequently tried before another jury." As it should be applied to courts-martial, and in the historical setting of this case, the principle of "necessity" (*supra*, pp. 39-43) fully justified the action taken. We shall discuss, first, the actual situation confronting the military commander; secondly, his status as appointing officer and his authority under military law to withdraw charges; and, thirdly, the factors which compel the conclusion that the discontinuance of this military trial, in these circumstances, did not establish a bar to retrial.

a. This was the spring of 1945, and American troops were advancing into Germany in the final effort to overwhelm the enemy and end the European war.[20a] Beginning on the day after the first court-martial's adjournment on March 27, 1945, the 76th Division commenced a rapid advance from the Rhine area on the West directly into the heart of Germany, which required it to move its headquarters progressively forward 14 times in less than a month, over a distance of some 275 miles (see graphic sketch, Appendix *infra*, reproduced from

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[20a] See Biennial Report of the Chief of Staff of the United States Army, 1943 to 1945, to the Secretary of War ("The Winning of the War in Europe and the Pacific")—subsections entitled "Closing the Rhine," "The Watch That Failed", and "The Knockout."

map facing R. 30).[20b] When the charges were withdrawn from the first court-martial on April 3, 1945 (the Division rejoined the Third Army on April 2, 1945), the 76th's headquarters were already over 70 miles from Pfalzfeld, the original place of trial, and about 100 miles from Krov, where the German witnesses resided—and the Division was decidedly moving forward as fast and as far as German resistance would permit.

In these circumstances, the Commanding General of the 76th Division, upon whom was imposed the duty of supervising the proper functioning of the courts-martial under his jurisdiction, had the responsibility of determining whether the trial should be continued before the court-martial he had appointed. The solution of the problem involved the weighing of many factors, of some of which he was the only available and responsible judge. He was called upon to determine not only how the witnesses whose testimony the court-martial had required would be produced, but also whether it was advisable to bring them to the place of trial. Consideration of these matters—in the words of the Assistant Judge Advocate General—involved questions of the "expediency and desirability of transporting German witnesses from their homes to the place of trial when the witnesses must

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[20b] See *We Ripened Fast: The Unofficial History of the Seventy-Sixth Infantry Division* for a day-by-day description of the activities and rapid advance of the 76th Division after March 18, 1945, pp. 143 *et seq.* (ch. VII, "The Third Star," and ch. VIII, "Victory").

be moved a considerable distance in time of combat; the methods and means of feeding and billeting them while they were absent from their homes, and the time and effort for his personnel consumed in this effort" (R. 84-85).[21] At the same time, it was clear that his Division was on the march, with definite combat missions to accomplish, and that, if things went well, it would quickly and progressively increase the distance between itself and the witnesses' residence (Krov). He probably had orders from higher headquarters indicating the plan of advance and attack, which would have a bearing on the problem of continuing petitioner's interrupted trial. If, instead of bringing the witnesses to the court-martial, the court-martial were to go back to Krov from the advancing battle positions of the 76th Division, perhaps even greater problems would be encountered. Eleven members of the detail of the court-martial were officers of the 385th Infantry Regiment, whose primary duties at that very moment were to successfully accomplish the defeat of the enemy as soon as possible, and their loss for the necessary time might be serious or even unthinkable. Still another factor was the admonition in Standard Operating Procedure No. 35, Headquarters, European Theater of

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[21] At this time, it was "a matter of notorious knowledge," as the Assistant Judge Advocate General said, "that the ordinary means of travel in Germany were disrupted and in some cases entirely destroyed" (R. 81-2).

Two of the three requested additional witnesses had apparently been sick at the time of the original trial (March 27, 1945) (R. 16). Two of them were women (R. 16).

Operations, U. S. Army, 16 July 1944, that court-martial trial of offenses involving the peace and quiet of a civil community should be held in the immediate vicinity of the offenses (R. 17, fn. 4).

With these factors all present, the Commanding General determined that the charges should be withdrawn from his court-martial because of the military situation, and the case transferred to Third Army Headquarters, which was further to the rear, less directly involved in actual contact with the enemy, and closer to Kroy.[22] Third Army Headquarters was itself moving forward rapidly in the push across Germany, and the charges were subsequently transferred to Fifteenth Army Headquarters which then had jurisdiction over the Kroy area which the Third Army had left (R. 17); between the time the Third Army received the papers in the case (about April 3, 1945), and the time it transferred them to the Fifteenth Army (April 18, 1945), its own front lines had advanced as much as 125 miles at some points (see graphic sketch, Appendix, *infra*). Petitioner's trial by a

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[22] The Commanding General pointed out that the two witnesses requested by the court had been "unable to be present due to sickness" and that "Due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time" (R. 16). The words "the tactical situation" clearly referred—in military parlance—to the then existing pressing military and combat conditions. In another connection, the record contains a second reference to a "tactical situation" which indicates the combat and battle connotations of the term (R. 65).

Fifteenth Army court-martial took place at Bad Neuenahr (R. 8), about 40 miles from Krov.

b. The Commanding General's withdrawal of the charges was authorized by the military law. The officer empowered to convene a court-martial has full power to withdraw any charges from consideration by the court, to enter a *nolle prosequi* as to any charges, and to dissolve the court itself. *Manual for Courts-Martial, 1928*, pars. 5a (quoted in pertinent part, *supra*, p. 32) and 72. The power to enter a *nolle prosequi*, which in the civil courts is normally vested either in the prosecutor alone or in the prosecution with the consent of the court (cf. Rule 48(a), F. R. Crim. P., 327 U.S. at 870), is at military law wholly vested in the appointing authority, and neither the court nor the prosecutor alone may take this action. *Manual for Courts-Martial, 1928, supra.* This has always been the rule. Winthrop, *Military Law and Precedents* (2d ed. 1896, 1920 reprint), pp. 155-6, 192-3, 246-247; *Manual for Courts-Martial, 1921*, p. 128. Petitioner improperly characterizes the convening authority as "a representative of the prosecution" (Pet. 16) and as "acting in the role of a prosecutor" when he withdraws charges (Pet. Br. 23). On the contrary, the whole structure of military justice is based upon the appointing officer's impartial status "as the representative of the United States," as Winthrop puts it (op. cit. *supra*, pp. 155, 247; see for same phrase *Manual for Courts-Martial, 1921*, p. 128). And the convening authority's supreme power to withdraw charges—with or without

the concurrence of the trial judge advocate is specifically based upon that independent position. Whether or not this plenary authority is exercised under such circumstances as to raise a bar to a second trial is, of course, a different question, the answer to which will depend (as we assume in this phase of the argument) upon the reasons for withdrawal or discontinuance. This is no different from the civil practice in which a court may have power to discharge the jury, though the circumstances of discharge prohibit a retrial. Cf. *United States* v. *Kraut*, 2 F. Supp. 16, 19 (S.D. N.Y.).

Petitioner appears to argue, however, that even if the appointing officer has authority to withdraw charges, he cannot ever do so by himself without necessarily raising a bar to second trial, because the issue of need for discontinuance must be decided by the court-martial, or at least requires a hearing in which petitioner or his counsel participates (Pet. Br. 16, 23-4). But, as we have just pointed out, the military law categorically forbids the court-martial from discharging itself, withdrawing charges, or entering a *nolle prosequi*, and exclusively endows the convening officer with that authority. See particularly Winthrop, *op. cit., supra*, at 155, 247. If anyone is to decide whether the trial should be discontinued it is the convening authority on whom the responsibility lies. Moreover, his position as military commander normally makes him the best, and in some instances the only, available judge of the diverse factors bearing upon the necessity for interrupting the trial. (Compare, for

instance, the complex of factors existing in the instant case, discussed *supra*, pp. 45-48): Determination of the issue of necessity has not been, and need not be, entrusted to the members of the court-martial, particularly during the course of field operations in time of war in a foreign country. (See the review of the Assistant Judge Advocate General, R. 84-85). It is too late to deny a military appointing officer's powers and duties, or to reject his status—different from that of a civil court but not unlike that of the head of a civil administrative agency—as a combined administrative, military, and judicial authority charged with "responsibility for the proper functioning of the general courts-martial of his jurisdiction" (R. 84). It is equally idle to claim that he can only discharge this responsibility upon notice and hearing. When he refers charges for trial and when he acts as reviewing authority after conviction, there is no such requirement (cf. *United States ex rel. Weintraub* v. *Swenson*, 165 F. 2d 756, 757-8 (C.A. 2)), and we see even less reason for imposing the obligation in a matter which directly concerns the existing military situation and the needs of the command.

Once it be granted, as we think it must, that the convening authority is empowered to discontinue a trial because of necessity, it follows—and so the Court of Appeals held (R. 101-102)—that his determination cannot be upset short of a showing of abuse of discretion, or a use of the power for plainly insufficient ends. In the civil courts, where the power to discharge the jury is vested in the

trial judge, the rule is that "whether the discharge of the jury was manifestly necessary in order to prevent a defeat of the ends of public justice, was a question to be finally decided by the presiding judge in the sound exercise of his discretion." *Logan* v. *United States*, 144 U. S. 263, 298; *United States* v. *Perez*, 9 Wheat. 579, *Simmons* v. *United States*, 142 U. S. 148; *Commonwealth* v. *Purchase*, 2 Pick. 521, 524-5, 526 (Mass.).[23] The specialized character of the problems presented to a military commander exercising court-martial jurisdiction, as well as the historical checks on undue interference by the federal judiciary with the military justice system, impel comparable acceptance of an appointing officer's determinations of necessity.

c. Though petitioner argues stoutly to the contrary (Pet. Br. 16, 18-22), we think that in the circumstances we have described (*supra*, pp. 45-48), the Commanding General's withdrawal of the charges against petitioner constituted a wholly unexceptionable determination that military necessity required the discontinuance of the trial.

(1) Even in the civil courts, there is no absolute rule that a jury cannot be discharged, without barring a retrial, because witnesses thought to be necessary are unavailable. *Cornero* v. *United States*, 45 F. 2d 69 (C.A. 9), on which petitioner strongly relies, holds no more than that a discharge

[23] "The existence of this necessity must be determined by the court, on the high responsibility they are under to the public". Parker C.J., 2 Pick. at 524.

at the instance of a prosecuting attorney who finds, after impanelment of the jury, that his witnesses are absent is not a discontinuance from necessity. But it might well be another matter if a witness desired by the court suddenly fell ill, or even if an important prosecution witness unexpectedly became unavailable after the trial had begun. A second trial is not forbidden where the first is discontinued because of the illness of the judge (*Freeman* v. *United States*, 237 Fed. 815 (C.A. 2)) or the defendant (*United States* v. *Bigelow*, 14 D.C. Rep. 393, 401 (Sup. Ct. D. C.), or a juror (*United States* v. *Potash*, 118 F. 2d 54 (C.A. 2), certiorari denied, 313 U. S. 584), even though the alternative of continuance may exist. So, it is not unlikely that even in the civil courts a properly explained, and unanticipated, absence of important witnesses could furnish sufficient cause for a discharge which would not prevent further proceedings.

(2) But courts-martial differ significantly from civil courts, especially courts-martial in a theater of combat operations. The considerations which may lead to a finding of double jeopardy where a first civil trial is discontinued because witnesses are unavailable, for whatever reason, do not exist for military tribunals. Civil courts normally function in a more-or-less secure world; they have fixed places of trial and fixed terms of court; calendars are published in advance, and continuances are frequently arranged or allowed; the prosecutor knows when his witnesses must be ready and he has process to compel their attendance. On the other

nd, as the Assistant Judge Advocate General inted out (R. 80-81):

> * * * the static conditions of the civil courts do not prevail with respect to the military courts and particularly the military courts which must function in the field of operations and combat. Courts-martial are not permanent institutions in the sense of permanency of the civil courts. They are called into being at the will of the authority holding courts-martial jurisdiction. Their membership is subject to continuous change depending upon other duties of the personnel who are eligible to be appointed members of same. They conduct their business at such times and places as general conditions in the field permit or require. They have no fixed and predetermined places of sitting. There are no terms of courts-martial (Cf: CM ETO-16623, Colby), and due to the exigencies of the situation under which they operate they cannot arrange trial calendars in advance with the same degree of certainty and accuracy as do the civil courts. In order to perform their duties efficiently and expeditiously, they must possess a high degree of flexibility. They conduct their trials under unusual conditions primarily dictated by the military situation and the condition of the command.

With respect to the attendance of witnesses, he so pointed out (R. 81-82):

> * * * there is an aspect of the actual functioning of [military courts] which must be given proper weight and consideration.

> Witnesses may be compelled, under penalty of law, to attend and give testimony in the civil courts of the United States. The witnesses come to the court; the court does not go to the witnesses. In this respect there is a certainty and security upon which the prosecution and defense alike may rely. With respect to the courts-martial sitting in the United States the same condition prevails (AW 23). In the functioning of our military courts in the field, however, and particularly in foreign countries entirely different conditions exist. * * * In Germany, the compulsory attendance of civilian witnesses is theoretically possible because of the overriding power of the conqueror. In the case of the latter country, however, practical considerations will weigh heavily against theoretical possibilities. At the time of the first or incomplete trial, in the instant case it is a matter of notorious knowledge that the ordinary means of travel in Germany were disrupted and in some areas entirely destroyed. * * *

(3) Here, the two witnesses requested by the first court-martial were sick at the time of the trial (R. 16), and there is no suggestion that they were deliberately withheld by the trial judge advocate. The court desired to hear them, as was its right (*supra*, p. 44), and continued the case until they could appear (R. 16). In a civil trial, the continuance would have been sufficient to handle the matter. But in this military case there then intervened the 76th Division's rapid advance across Germany—the "tactical situation" to which the

appointing authority referred in transferring the charges (R. 16). We have sketched the complexities of the problem with which he was then presented (*supra*, pp. 45-48). In good faith, "he determined that the tactical situation of his troops required that the trial be taken to the witnesses rather than the witnesses be brought to the trial", and in doing so, "he decided a question which involved the military necessities of his command" (R. 85). In the light of the circumstances and the problem presented (*supra*, pp. 45-48), of the differences between courts-martial and civil tribunals (*supra*, pp. 53-54), and of the discretion vested in the appointing officer (*supra*, pp. 48-52), this determination cannot be held an improper exercise of the power to discontinue a trial for necessity. The Commanding General's stated grounds indicate that the trial was not stopped for "insufficient cause", but for "serious" reasons. (*Sanford* v. *Robbins*, 115 F. 2d 435, 438-9 (C.A. 5), certiorari denied, 312 U.S. 697), and there is no basis for questioning his responsible evaluation of the situation.[24] As the courts have long recognized (*supra*, pp. 42-43), the necessity principle is flexible enough

[24] Petitioner asserts that "There is not the slightest proof of any character as to the nature of the tactical situation" (Pet. Br. 26). This overlooks the known historical facts of the 76th Division's advance (*supra* pp. 45-48), and equally neglects the settled rule that the burden is on petitioner to show abuse of discretion in order to sustain his plea of double jeopardy. *Kastel* v. *United States*, 23 F.2d 156, 157 (C. A. 2), certiorari denied, 277 U.S. 604; *United States* v. *Potash*, 118 F.2d 54, 56 (C. A. 2), certiorari denied, 313 U.S. 584. See *infra* pp. 63-64. Neither the dissenting judge below, nor

to cover all discontinuances for proper reasons, whenever the appropriate circumstances manifest themselves. We think it clearly governs here. Cf. (1948) 48 Col. L. Rev. 299.

We do not mean to suggest, of course, that it would have been open to the military commander under the pretense of acting on tactical considerations to withdraw the case by way of *nolle prosequi*, and then re-refer the charges to another court-martial appointed by him. In such circumstances, the rule of double jeopardy might well apply.[25] Cf. *Clawans* v. *Rives*, 70 App. D. C. 107, 104 F. 2d 240. But where, as here, no showing has been made, or attempted, that the reason assigned by the military commander was sham, it cannot be disregarded.

3. The ground on which the second court-martial rejected petitioner's plea of double jeopardy is immaterial.

Petitioner also contends (Pet. Br. 18, 28-9) that since the Fifteenth Army court-martial which overruled his plea of double jeopardy did not base its decision on the doctrine of necessity, reliance upon that ground by the Court of Appeals constitutes a denial of due process of law.

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the trial court, intimated any question as to the nature or seriousness of the military situation. See *infra* pp. 60-64.

[25] This is on the assumption that the military rule (*supra* pp. 25-38) is not controlling. The armed forces now prohibit the withdrawal of charges in order to prevent a finding by the court (*Manual for Courts-Martial, U.S. Army, 1949*, par. 73; *Naval Courts and Boards*, sec. 408), but in the case of the Army such an improper withdrawal does not appear to be considered a basis for a later plea of double jeopardy. See *supra* pp. 32, fn. 15, 38-39, fn. 18.

The record of petitioner's trial does not disclose the reasons for the court-martial's decision in overruling the plea in bar. It merely declared that the plea was denied (R. 127). True, the prosecutor's argument stressed the fact that there had been no previous conviction or acquittal (R. 122-126), but the court had before it the record of the previous 76th Division trial, indicating the reason for the original continuance (which was also specifically called to its attention by defense counsel) (R. 120), and the court may very well have been influenced in denying the plea by its own knowledge of the effect of the campaign in Germany, and the movements of the 76th Division, on the practicability of resuming the trial when the requested witnesses were ready to testify. Certainly, the Board of Review (R. 73-76), the Assistant Judge Advocate General (R. 79-87), and the Commanding General, United States Forces, European Theater (R. 87, 9-10) all considered the issue of necessity, and the latter—the highest military authority in the case (*supra,* p. 9)—confirmed the sentence, after considering the Board's review, on the basis of the opinion of the Assistant Judge Advocate General that the requirements of the necessity principle were satisfied.

But the basic fallacy of petitioner's position is his supposition that he must be released, in a habeas corpus proceeding, unless the court-martial's rejection of his plea can be sustained on the grounds considered by that tribunal. We think the law is otherwise. He is not entitled to release

unless he can sustain his plea in *this* proceeding, just as in a proper case a prisoner can be freed on a showing of an unfair trial even though he had not made that showing to the trial court. A petitioner in habeas corpus is free to go outside the record of his trial to establish lack of jurisdiction or deprivation of rights by the tribunal which tried him (e.g. *Johnson* v. *Zerbst,* 304 U. S. 458; *Von Moltke* v. *Gillies,* 332 U. S. 708), and the respondent may similarly support the jurisdiction and proceedings of the trial court by matters dehors the record (*Givens* v. *Zerbst,* 255 U. S. 11; *Bowen* v. *Johnston,* 306 U. S. 19, 27). It would be strange if the decisions of courts-martial, generally composed of laymen, could be invalidated every time a wrong reason was given on a point of law, even though the decision itself be wholly free from error or unfairness.[26] And petitioner's argument leads to the further curious result that if the plea had excusably not been made before the court-martial, respondent would then be free in this proceeding to show that the plea was bad on any ground.[27]

[26] Cf. *Sanford* v. *Robbins,* 115 F.2d 435 (C. A. 5), certiorari denied, 312 U.S. 697, and *Wrublewski* v. *McInerney,* 166 F.2d 243 (C. A. 9), in both of which pleas of double jeopardy were denied, on habeas corpus, apparently on grounds not considered by the court-martial at the trial.

[27] The claim also seems to be made that the respondent did not present to the District Court the necessity principle, as we have argued it and the Court of Appeals decided it (Pet. Br. 18, 28). The argument of Government counsel (R. 40), and the presentation of the Assistant Judge Advocate General's opinion (R. 78-87) (which applies the necessity principle as we urge it, and which the District Court considered, R. 23-5), suffice to show the hollowness of the contention.

Cole v. Arkansas, 333 U. S. 196, cited by petitioner (Pet. Br. 28) is not pertinent. In that case, the petitioners were convicted under one section of a statute and the convictions were affirmed under another section, violations of which had not been charged. But the cardinal principle that one cannot constitutionally be convicted of a charge on which one has never been tried will not stretch to a principle that one's conviction cannot be sustained on habeas corpus unless the trial court gave the right reasons for its right decisions.

III

THE COURT OF APPEALS' DETERMINATION OF THE REASON FOR THE DISCONTINUANCE OF THE FIRST TRIAL IS CORRECT AND SHOULD BE ACCEPTED

A. It is said (Pet. Br. 17-18, 24-27) that the Court of Appeals improperly made findings in conflict with the facts stipulated by the parties, with the showing in the record, and with the findings of the District Court. These charges rest on a series of misconceptions of the record in the proceeding and of the pertinent facts.

1. There is no disagreement among the parties, the two courts below, and the military reviewing authorities, as to the actual sequence of events occurring between petitioner's first incomplete court-martial and the trial at which he was convicted. What "factual" disagreement there is has arisen, first, from varying understandings of the reasons prompting the withdrawal of the charges from the first court, and, secondly, because of different views as to the factual support for the

reasons assigned for withdrawal.[28] Respondent has never agreed with petitioner on these points of conflict, and has never entered into any stipulation or understanding about them.

2. The reasons impelling the withdrawal of the charges do not appear in the communication addressed by the Commanding General, 76th Division, to his subordinate officer, the trial judge advocate, withdrawing the charges (Pet. Br. 5), but are contained, in official documentary form, in the Commanding General's letter transmitting the charges to Third Army Headquarters, which states that due to "the tactical situation" the distance to the residence of the desired additional witnesses, who were sick at the time of the original trial, had become so great that the trial could not be completed within a reasonable time (R. 16). Bearing upon the meaning of this statement is the Third Army's later letter transmitting the charges to the Fifteenth Army (R. 17), and, most importantly, the facts of historical record as to the closing phases of the American advance into Germany in the spring of 1945, and the movements of the 76th Division (*supra*, pp. 45-48; outline map, Appendix, *infra*; R. 27-28), which are indisputable and may be judicially noticed.[29]

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[28] Only petitioner claims that factual support for the assigned reasons is lacking. Insofar as there is any other disagreement as to the facts, it goes only to the interpretation of the assigned reasons. *Infra* pp. 61-63.

[29] See 9 Wigmore, *Evidence* (3rd ed. 1940), sec. 2580; *Clark* v. *United States*, 99 U.S. 493, 495; *Ohio Bell Telephone*

On this point, the District Court rather cryptically held (R. 25) that "the absence of witnesses, rather than an emergency due to the military situation seems to have been the reason for the withdrawal of the case from the court-martial which first heard it", and that "if the record in the case at bar indicated that the 'tactical situation' was the motivating reason for discharging the first court-martial, this Court would not hesitate to hold that the doctrine [of necessity] is applicable". This may have meant no more than that the first trial was continued because of the absence of witnesses requested by the court (which we admit), and that the charges were not withdrawn because the military situation made it impossible to carry on court-martial trials at all, irrespective of the problem of the court-requested witnesses (which we also admit). If this is so, the district judge's decision was based, not on a finding of fact as to the reason for withdrawal different from that of the Court of Appeals, but on an absolute ruling of law (similar to that of the Board of Review) that a proper discontinuance of a court-martial trial cannot, no matter what the circumstances, result from difficulties in making witnesses available at the trial. With this absolute ruling of law, the real crux of the case, the Court of Appeals and we disagree. *Supra* pp. 52-57.[30]

Co. v. *Commission*, 301 U.S. 292, 301-2; *De Célis* v. *United States*, 13 C. Cls. 117, 126; *Cuyler* v. *Ferrill*, 1 Abb. (U.S.) 169, 178-9, Fed. Case No. 3523, 6 Fed. Cas. at 1091 (C.C.S.D. Ga).

[30] Chief Judge Phillips, dissenting below (R. 105-106),

If, however, the District Court did find, as a fact, that the intervening military situation which developed after the trial had nothing substantial to do with the subsequent withdrawal of the charges, its finding was plainly erroneous and entirely unsupported by the only pertinent evidence in the case—the documentary exhibits and the historical facts of which notice should have been taken.[31] The Court of Appeals could rightfully disregard such a finding, particularly since the record contained no relevant testimony and the appellate tribunal was in the same position as the trial court to draw inferences and conclusions from the documentary material and the facts to be judicially noticed. Cf. *Baumgartner* v. *United States*, 322 U. S. 665, 670-671; ALI, Model Code of Evidence, Rule 806 (appellate court may notice facts judicially).[32] The

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seems to us to have based his decision on the same absolute ruling concerning the absence or unavailability of witnesses, rather than on a true finding of fact that the tactical situation did not enter into the military commander's determination. Petitioner, of course, supports the same position: "*Whatever the underlying cause*, the absence of witnesses is not ground for the termination of a trial so as to sanction a second prosecution for the same offense." (Pet. Br. 19, italics supplied).

[31] The court's pointed reference, in connection with its discussion of the reasons for the withdrawal, (R. 25) to "the record with reference to the closing and reopening of the case" (i.e., the closing of the first court-martial for deliberation and its reopening to request the additional witnesses) indicates that it may incorrectly have taken the reason for the continuance of the trial as synonymous with the reason for the later withdrawal of the charges, without considering the intervening military events.

[32] The outline map appended to this brief was also pre-

determination by the court below on this point (R. 101) was the only permissible one, in view of the Commanding General's explicit reference to the "tactical situation." *Supra* pp. 5, 45-48.

3. Petitioner goes further and challenges the existence of the military necessities on which the Commanding General of the 76th Division based his determination of withdrawal (Pet. Br. 12, 17, 26-27). The burden of proof rests upon petitioner (*supra* p. 56, fn. 24), and in a habeas corpus proceeding that burden requires him to show that the military commander's determination amounted to an abuse of discretion (*supra* pp. 51-57). But no proof at all has been presented, and even here petitioner does not suggest any substantial basis for impugning the Commanding General's decision. On the contrary, that determination appears to have been not only reasonable but correct.

B. In our view, the facts of the 76th Division's advance across Germany, schematically portrayed in the Appendix, are matters of history to be judicially noticed (*supra* p. 61). In any event, these facts were presented to the District Court in respondent's motion for reconsideration (R. 26-9), which should have been entertained. The trial court denied the motion on the ground that it had no jurisdiction, since motions for a new trial must be filed no later than ten days after judgment, under Rule 59(b), F.R. Civ. P., and this motion

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sented to the Court of Appeals. A more detailed map appears at R. 30.

came a month later (R. 31, 94, 95; *supra* pp. 10-11). But this is a habeas corpus proceeding and Rule 81 (a) (2) makes the civil rules applicable, except on appeal, only to the limited extent they reflect pre-existing practice. Cf. *Holiday* v. *Johnston*, 313 U. S. 342, 350-353; *United States ex rel. Jelic* v. *District Director of Immigration*, 106 F. 2d 14, 20 (C.A. 2); *Albert ex rel. Buice* v. *Patterson*, 155 F. 2d 429, 433 (C.A. 1), certiorari denied, 329 U. S. 739. The prior practice in habeas corpus permitted a district court to set aside its judgment during the term of court (*Tiberg* v. *Warren*, 192 Fed. 458 (C.A. 9); *Aderhold* v. *Murphy*, 103 F. 2d 492 (C.A. 10)), which had not yet expired in this case. Judicial Code, sec. 82, formerly 28 U.S.C. 157; R. 2, 26.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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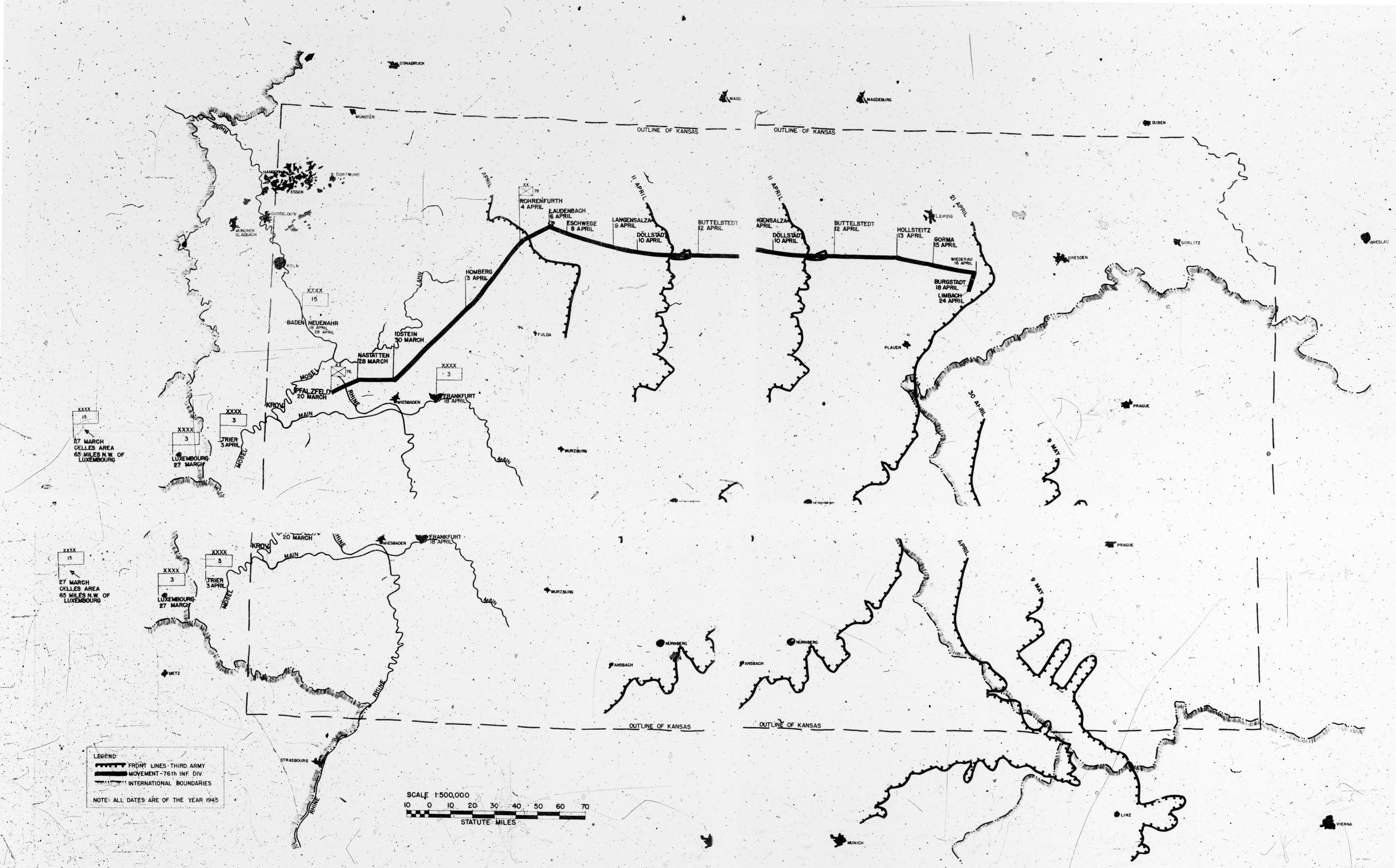
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